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### Developments in the right to defence for juvenile offenders since Vietnam's ratification of the Convention on the Rights of the Child

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## Developments in the right to defence for juvenile offenders since Vietnam's ratification of the Convention on the Rights of the Child

### Abstract

This article examines Vietnam's legal changes and law enforcement practices in regards to the right to defence of juvenile offenders since Vietnam ratified the United Nations Convention on the Rights of the Child in 1990. A combination of research methods is employed, including document analysis, statistical analysis, and selected case studies. The findings of the research indicate that Vietnam has demonstrated considerable improvement in acknowledging the right to defence of juvenile offenders in its law. The contemporary Vietnamese regulations are similar to the CRC's requirements about legal assistance for juvenile offenders. The implementation of the law, however, confronts difficulties as juvenile offenders and their parents' misunderstand the right to defence, and the procedure-conducting persons and defence councils' lack commitment to their responsibilities. Therefore, Vietnam needs more effective mechanisms in order to realise the right to defence for juvenile offenders, closing the gap between the rights on paper and in practice.

### Keywords

convention, rights, right, defence, developments, juvenile, child, offenders, since, vietnam, ratification

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# Developments in the Right to Defence for Juvenile Offenders since Vietnam's Ratification of the Convention on the Rights of the Child

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PHAM Thi Thanh Nga

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## ABSTRACT

This article examines Vietnam's legal changes and practices of law enforcement concerning the right to defence of juvenile offenders since Vietnam ratified the United Nations Convention on the Rights of the Child in 1990. A combination of research methods is employed, including document analysis, statistical analysis and selected case studies. The findings of the research indicate that Vietnam has demonstrated considerable improvement in acknowledging the right to defence of juvenile offenders in its law. The Vietnamese contemporary regulation is close to the CRC's requirements about legal assistance for juvenile offenders; however the implementation of the law confronts difficulties of juvenile offenders and their parents' misunderstanding of the right to defence while the procedure-

conducting persons and defence councils' lacking commitment to their responsibilities. Therefore, Vietnam needs more effective mechanisms in order to realise the right to defence for juvenile offenders, closing the gap between the rights on paper and in practice.

## I. INTRODUCTION

### A. Vietnam's Ratification of the Convention on the Rights of the Child

Vietnam is a developing country in Southeast Asia, with a population by the year 2011 of approximately 87.84 million people, with 30 percent of the population under 18 years of age.<sup>1</sup> According to the current Constitution (Constitution 2013),<sup>2</sup> Vietnam is a socialist country; the State is unified under one government, but there is responsible division and coordination among State bodies in the exercise of legislative, executive and judicial powers. The National Assembly has the duties and powers of making the constitution and laws, such as deciding the national development plans and other important matters of the whole country.<sup>3</sup> The Government is responsible for comprehensive management and administration.<sup>4</sup> The court system's function is to judge cases while the procuracy system is responsible for public prosecution and supervision of judicial activities, similar to the role of the Office of the Attorney General in the United States.<sup>5</sup>

The legal system of Vietnam is applicable nationwide, encompassing all regulations issued by state agencies embodying the National Assembly, the Government, and the Justices' Council of the Supreme People's Court.<sup>6</sup> The Constitution is the most fundamental law, producing the highest legal effect. The authority to issue legal normative documents is consistent with the function of each state agency and laws are promulgated with consideration of the constitutionality, legality, and consistency of legal documents in the legal

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<sup>1</sup> Tong Cuc Thong Ke, BAO CAO DIEU TRA LAO DONG VA VIEC LAM: VIET NAM 2011 [General Statistics Office, Investigating Report on Labour and Employment: Vietnam 2011] (Statistical Publishing House, 2012), *available at*: <http://www.gso.gov.vn/default.aspx?tabid=512&idmid=5&ItemID=12540>.

<sup>2</sup> See HIEN PHAP NUOC CONG HOA XA HOI CHU NGHIA VIETNAM NAM 2013, [the Constitution of the Socialist Republic of Vietnam 2013], [Hereinafter Constitution 2013] arts. 1-2, *available at* <http://luatvietnam.vn>.

<sup>3</sup> *Id.* at arts. 69-70.

<sup>4</sup> *Id.* at art. 94.

<sup>5</sup> *Id.* at arts. 102, 107.

<sup>6</sup> See LUAT 17/2008/QH12 VE BAN HANH VAN BAN QUY PHAM PHAP LUAT NAM 2008 [Law 17/2008/QH12 on the Promulgation of Legal Documents 2008], arts. 2, 82, *available at* <http://luatvietnam.vn>.

system.<sup>7</sup> For international conventions accepted by Vietnam, those instruments are usually converted into one or several domestic laws and detailed plans before coming into force.<sup>8</sup>

The United Nations Convention on the Rights of the Child<sup>9</sup> (CRC) was adopted in 1989 and entered into force in 1990. So far it has been accepted by 193 countries<sup>10</sup> and has become the international standard for children's rights and child protection around the world. Vietnam fully ratified the CRC in 1990.<sup>11</sup> Vietnam is the first country in Asia and the second in the world to accept the Convention.<sup>12</sup>

Under the CRC, state parties have a responsibility for undertaking all appropriate measures for the implementation of the rights set forth therein, and for the full and harmonious development of persons below the age of 18 years.<sup>13</sup> In terms of the administration of juvenile justice, the CRC regulates that state parties shall ensure that every child alleged as or accused of having infringed the penal law is at least provided with the guarantees indicated in article 40/2(b) of the Convention. That includes the guarantee "to have legal or other appropriate assistance in the preparation and presentation of his or her defence".<sup>14</sup> It means that, under the CRC, ensuring the right to defence of juvenile offenders is one of the minimum standards of juvenile justice. In addition, this provision should be understood in light of relevant international instruments specifying the rights of children breaking the penal law or who are juvenile offenders. Relevant documents include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules),<sup>15</sup> two general comments of the Committee on the Rights of the Child, No.

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<sup>7</sup> *Id.* arts. 3, 11-21

<sup>8</sup> *See generally* LUAT 41/2005/QH11 KY KET, GIA NHAP VA THU HIEN DIEU UOC QUOC TE [Law 41/2005/QH11 on the Conclusion, Accession to and Implementation of Treaties], art. 72, *available at* <http://luatvietnam.vn>.

<sup>9</sup> United Nations Convention on the Rights of the Child, Nov. 20, 1989, [Hereinafter CRC], *available at* <http://www2.ohchr.org>.

<sup>10</sup> *See generally* Status of Treaties, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/ViewDetails.aspx>. (last visited Dec. 16, 2012).

<sup>11</sup> *See id.*

<sup>12</sup> In 2000 and 2001, respectively, Vietnam signed and ratified the Optional Protocol to the CRC on the involvement of children in armed conflict, and the Optional Protocol to the CRC on the sale of children, child prostitution, and pornography.

<sup>13</sup> CRC, *supra* note 9, Preamble, art. 1.

<sup>14</sup> *Id.* at art. 40(2)(b)(ii).

<sup>15</sup> United Nations Standard Minimum Rules for the Admin. of Juvenile Justice, G.A. Res. 40/33, Annex, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

10(2007): Children's Rights in Juvenile Justice,<sup>16</sup> and No. 12(2009): The Rights of the Child to be heard.<sup>17</sup>

The Vietnamese Government has stated that child care and protection is a national tradition and a consistent policy, and “implementing child rights is one of the focuses of human rights in Vietnam.”<sup>18</sup> Vietnam has submitted national reports on the implementation of the CRC<sup>19</sup> in 1993, 1998, 2002, 2007, and 2012 and submitted reports on the implementation of the two optional Protocols to the CRC in 2006.<sup>20</sup>

Since Vietnam’s ratification of the CRC, living standards of children in Vietnam have generally improved in every aspect – from nutrition, health, and education to entertainment and recreation. This has been acknowledged by the Committee on the Rights of the Child and the international community.<sup>21</sup> However, the implementation of the CRC in general, especially the realization of child rights in the judicial sector has not reached the standards set forth in the Convention and relevant instruments. As I will discuss below, the right to defence for juvenile offenders is not yet conducted effectively and needs further improvement.

## **B. Penal Liability and Criminal Procedure**

After declaring independence in 1945, the Vietnamese Government issued an edict, which prolonged the validity of existing legal normative documents, until reform was undertaken, as long as provisions were not contrary to the new regime of Vietnam.<sup>22</sup>

<sup>16</sup> Children's Rights in Juvenile Justice, Comm. on the Rights of the Child, Gen. Comm. 10, Jan. 15–Feb. 2, 2007, U.N. Doc. CRC/C/GC/10; U.N. CRC, 44th Sess., (Apr. 25, 2007).

<sup>17</sup> The Right of the Child to be Heard, Comm. on the Rights of the Child, Gen. Comm. 12, May 25–Jun. 12, 2009, U.N. Doc. CRC/C/GC/12; U.N. CRC, 51st Sess., (July 20, 2009).

<sup>18</sup> VIETNAM, NATIONAL REPORT ON THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD 1993-1998, 66 (1999).

<sup>19</sup> See Vietnam, National Report on Two Years Implementation of the United Nations Conventions on the Rights of the Child (1993); National Report on the Implementation of the Convention on the Rights of the Child 1993-1998 (1999); Updated Report on the Implementation of the Convention on the Rights of the Child 1998-2002 (Dec. 2002); The Third and Fourth Country Report on Vietnam's Implementation of the United Nations Convention on the Rights of the Child in the 2002-2007 Period (2008); Implementation of the Convention on the Rights of the Child, Comm. of the Rights of the Child, Add. 1, May 29–June 15, 2012, U.N. Doc. CRC/C/VNM/Q/3-4/Add.1; U.N. CRC, 60th Session, (May 24, 2012).

<sup>20</sup> See Vietnam, National Report on Implementation of the Optional Protocol to the Convention on the Rights of the Child of Children on the Involvement of Children in Armed Conflict (2006); National Report on Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2006). Since 2007, reports on the implementation of the two optional protocols have been included in reports on implementation of the CRC.

<sup>21</sup> See UNICEF, *An Analysis of the Situation of Children in Viet Nam 2010*, at 17, 297 (2010) (claiming that Vietnam has made tremendous progress and unprecedented improvements for its children).

<sup>22</sup> SAC LENH 47-SL GIU NGUYEN CÁC LUAT LE HIEN HANH CHO DEN KHI BAN HANH NHUNG BO LUAT PHAP CHO TOAN QUOC [Edict 47-SL on Prolonging the Validity of Existing Legal Normative Documents until New Codes introduced throughout the Whole Country], Oct. 10, 1945, art. 1, *available at* <http://luatvietnam.vn>.

Accordingly, the legal documents on criminal justice that applied in North, Central, and South Vietnam were different until the national reunification in 1975, even though several edicts or decrees aiming to adapt to the social situation were issued. In the field of criminal justice, the consistent application of legal codes nationwide has only really happened since the appearance of the Penal Code of 1985 (“1985 Code”)<sup>23</sup> and the Criminal Procedure Code of 1988 (“1988 Code”).<sup>24</sup>

In the modern history of Vietnamese law, the 1985 Code and the 1988 Code were the first codes. These were significant milestones, although they have since been replaced by new versions. The Penal Code of 1985 set forth all crimes and punishments, while the Criminal Code of 1988 prescribed the order and procedures for solving criminal violations. These codes were more than a simple systematization of many different edicts, decrees, and ordinances, which were issued earlier and inherited from the previous government, into one instrument. They combined the essence of different legal traditions to build a consistent legal document in the context of numerous difficulties in Vietnam’s contemporary society. According to John Quigley, the 1985 Code is the first code that qualifies as “indigenous” and addresses the situation of Vietnam, although it also has influence from several major legal traditions: the continental style and the socialist countries, and embracing French, Chinese and socialist law,<sup>25</sup> with significant influence from the former Soviet Union.<sup>26</sup>

In relation to human rights, although neither of these codes uses the term “human rights,” the 1985 Code and 1988 Code have created the fundamental legal basis for the protection of human rights in general, including human rights for children, as can be seen from the statements below.

Only those persons who have committed crimes prescribed in the Penal Code shall bear penal liabilities;<sup>27</sup>

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<sup>23</sup> BO LUAT HÌNH SU NAM 1985 [Penal Code 1985], available at <http://luatvietnam.vn> [hereinafter 1985 Code].

<sup>24</sup> BO LUAT TO TUNG HÌNH SU NAM 1988 [Criminal Procedure Code 1988], available at <http://luatvietnam.vn> [hereinafter 1988 Code].

<sup>25</sup> John Quigley, *Vietnam's First Modern Penal Code*, 9 N.Y.L. SCH. J. INT’L & COMP.L. 143-44 (1988); John Quigley, *Vietnam at the Legal Crossroads Adopts a Penal Code*, 36 AM. J. CRIM. L. 351 (1988). See also Hoa Phuong Thi Nguyen, *Legislative Implementation by Vietnam of its Obligations under the United Nations Drug Control Conventions* 36 (Ph.D. thesis, University of Wollongong, 2008). Thang Vinh Thai, *Van hoa Phap luat Phap va nhung Anh huong to Phap luat o Viet Nam* [France’s Legal Culture and its Influence in Vietnam’s Law], 2008 N.C.L.P. 11, 13-16.

<sup>26</sup> See, e.g., Thanh Nhat Phan, *Recognising Customary Law in Vietnam: Legal Pluralism and Human Rights* 189 (Ph.D. thesis, University of Wollongong, 2011).

<sup>27</sup> See 1985 Code, *supra* note 24, art. 2 (also note that under Vietnamese law, only natural persons can commit crimes, the corporation is not a subject to criminal law).

Persons aged full 16 years or older shall have to bear penal liability for all crimes they commit while persons aged full 14 years or older but under 16 shall have to bear penal liability for intentional commission of a serious crime which has caused great harm to society and the maximum penalty bracket for such crimes is over five years of imprisonment, life imprisonment or capital punishment;<sup>28</sup>

The Criminal Procedure Code prescribes the order and procedure of instituting, investigating, prosecuting and adjudicating criminal cases and executing criminal judgements; and the rights and obligations of the participants in the procedure;<sup>29</sup>

All criminal proceedings must be conducted in accordance with this Code [1988];<sup>30</sup>

The treatment of juvenile offenders shall be conducted in accordance with special procedures; the main aim is to educate and help them redress their wrongs, develop healthily and become citizens useful to society.<sup>31</sup>

During the period of their validity, the 1985 Code and 1988 Code were amended several times; however, there was no amendment concerning offenders' right to defence counsel.<sup>32</sup> These codes were replaced by the Penal Code of 1999<sup>33</sup> (1999 Code) and the Criminal Procedure Code 2003<sup>34</sup> (2003 Code), which are currently the bases for defining criminal violations, determining penalties, and solving crimes. The two new codes have inherited and enhanced the essence of their predecessors to accommodate changes in

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<sup>28</sup> See 1985 Code, *supra* note 23, at arts. 8, 57.

<sup>29</sup> See 1988 Code, *supra* note 24, at art. 1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at arts. 271-280. See also 1985 Code, *supra* note 23, at art. 58

<sup>32</sup> The 1988 Code was amended three times: in 1990, 1992, and 2000; the 1985 Code was amended four times: in 1989, 1991, 1992 and 1997.

<sup>33</sup> BO LUAT HINH SU NAM 1999, DIEU 12, DUOC SUA DOI BO SUNG THEO LUAT 37/2009/QH12 SUA DOI, BO SUNG MOT SO DIEU CUA BO LUAT HINH SU [Penal Code 1999, art. 12, amended by the Law 37/2009/QH12 Amending and Supplementing a Number of Articles of the Penal Code], *available at* [http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=6163](http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6163); English translation *available at*

[http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=610](http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610) (Vietnam) (hereinafter Code 1999).

<sup>34</sup> BO LUAT TO TUNG HINH SU NAM 2003 [Criminal Procedure Code of 2003], *available at* [http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=19431](http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=19431); English translation *available at* [http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=8236](http://vbqppl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=8236) (Vietnam) (hereinafter Code 2003).



Vietnam's socio-economic situation and its responsibilities when ratifying international treaties, including the CRC.

A remarkable change concerning juvenile justice is that the 1999 Code presented a new division of crimes, classified into four kinds, instead of the two used previously. Accordingly, there have also been some changes in penal liabilities. For example, “[p]ersons aged . . . 16 [years] or older shall have to bear penal liability for all crimes they commit”; and “[p]ersons aged . . . 14 [years] or older but under 16 [years old] shall have to bear penal liability for very serious crimes intentionally committed or particularly serious crimes.”<sup>35</sup>

Article 8 defines less serious crimes as those which cause no great harm to society; the maximum penalty for such crimes is three years imprisonment.<sup>36</sup> Serious crimes are defined as those which cause great harm to society; the range of penalties for such crimes is between three and seven years imprisonment.<sup>37</sup> Very serious crimes are defined as those which cause very great harm to society; the range of penalties for such crimes is between seven and fifteen years of imprisonment.<sup>38</sup> Particularly serious crimes are defined as those which cause exceptionally great harm to society; the penalty for such crimes shall be over fifteen years of imprisonment, life imprisonment, or capital punishment.<sup>39</sup> Particular provisions for the four kinds of crime – less serious, serious, very serious and particularly serious – are illustrated in the following examples. Less serious: “Any mother who, due to strong influence of backward ideology or special objective circumstances, kills her new-born or abandons such baby to death, shall be sentenced to non-custodial reform for up to two years or to between three months and two years of imprisonment”;<sup>40</sup> serious: “Any person who unintentionally causes the death of another person shall be sentenced to between six months and five years of imprisonment”;<sup>41</sup> very serious: “Any person who unintentionally causes the death of more than one person shall be sentenced to between three and ten years of imprisonment”;<sup>42</sup> particularly serious: “Any person who murders more than one person shall be sentenced to between twelve and twenty years of imprisonment, life imprisonment, or capital punishment.”<sup>43</sup>

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<sup>35</sup> Code 1999, *supra* note 33, art. 12.

<sup>36</sup> *Id.* art. 8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* art. 94.

<sup>41</sup> *Id.* art. 98/1.

<sup>42</sup> *Id.* art. 98/2.

<sup>43</sup> *Id.* art. 93/1/a.

However, in the application of punishment for juvenile offenders, there are several special provisions. First, “[l]ife imprisonment or the death sentence shall not be imposed on juvenile offenders; when handing down sentences . . . the courts shall impose on juvenile offenders lighter sentences than those imposed on adult offenders of the corresponding crimes.”<sup>44</sup> Second, “[i]f the applicable law provisions stipulate life imprisonment or the death sentence, the highest applicable penalty shall not exceed eighteen years of imprisonment” for juvenile offenders aged between 16 and 18 years.<sup>45</sup> And third, “[i]f the applicable law provisions stipulate life imprisonment or the death sentence, the highest applicable penalty shall not exceed twelve years” for juvenile offenders aged between 14 and 16 years.”<sup>46</sup>

During the course of criminal proceedings, the offender has rights as a person held in custody, as an accused or as a defendant – corresponding to different stages in the criminal procedure. The right to defence is usually considered as the most important right, especially for the cases dealing with juvenile offenders. However, the specific content and the practical application of this right have changed over time. Below, I will focus on legal changes concerning the right to defence of juvenile offenders since Vietnam ratified the CRC in 1990.

## **II. REFORM OF LEGAL PRACTICES CONCERNING THE RIGHT TO DEFENCE OF JUVENILE OFFENDERS SINCE 1990 IN VIETNAM**

### **A. Overview of the Right to Defence in Vietnam’s Legal System**

The right to defence was recognized very early in the history of legislation in Vietnam.<sup>47</sup> In the first legal normative documents produced after proclaiming independence on 2 September 1945, the Vietnamese Provisional Government paid attention to issues of defence and the persons who can conduct professional defence – lawyers.

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<sup>44</sup> *Id.* art. 69/5.

<sup>45</sup> *Id.* art. 74/1.

<sup>46</sup> *Id.* art. 74/2.

<sup>47</sup> In this paper the author just examines the legal system in Vietnam’s modern society since the Socialist Republic of Vietnam proclaimed its independence in 1945. However, it is indicated that defence had been regulated in the legal documents of Vietnam’s feudal doctrine regime, art. 691 of Hong Duc Code, which was introduced between 1470 and 1497 (See Hoai Trung Phan, *Buoc dau tim hieu tu tuong Ho Chi Minh ve bao dam quyen bao chua cua Cong dan* [A pilot study on Ho Chi Minh’s ideology concerning the assurance of citizens’ right to defence], 2005 Khoa H.P.L. 3, 4).

- Edict 33C-SL of 13/9/1945 on the Establishment of the Military Court states that defendants can defend themselves or ask lawyers to defend them;<sup>48</sup>
- Edict 46-SL of 10/10/1945 on the Lawyer provides criteria and requirements for lawyers and their legal services, stating that lawyers must have a Bachelor of Laws, good conduct, a three-year period of experience in legal practice;<sup>49</sup>
- Edict 64/SL of 23/11/1945 on the Establishment of Special Committee of Inspection indicates that defendants can defend themselves or ask lawyers to defend them; the junior who is responsible for reading reports can assign a lawyer to defend the defendant free of charge.<sup>50</sup>

Over time, the right to defence was recorded in many important legal documents, such as the Constitutions of 1946, 1959, 1980, 1992 and 2013;<sup>51</sup> the Edicts on the Court Organisation and Judges in 1946 and on the Establishment of the Special Court in 1953;<sup>52</sup> the Laws on the Organisation of the People's Court in 1960, 1981, 1992, and 2003;<sup>53</sup> and the Criminal Procedure Codes of 1988, and of 2003.<sup>54</sup> The relevant articles set forth in Vietnam's

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<sup>48</sup> See SAC LENH 33C-SL VE THANH LAP TOA AN QUAN SU [Edict 33C-SL on the Establishment of the Military Court], promulgated by Chu tich Chinh phu lam thoi [President of Provisional Government] (Sep. 13, 1945), available at <http://luatvietnam.vn> (Vietnam).

<sup>49</sup> See SAC LENH 46-SL VE LUAT SU VA TO CHUC LUAT SU [Edict 46-SL on the Lawyer and Organizations of Lawyers], promulgated by Chu tich Chinh phu lam thoi [President of Provisional Government] (Oct. 10, 1945), available at <http://luatvietnam.vn> (Vietnam).

<sup>50</sup> See Sac lenh 64/SL ve Thanh lap Ban thanh tra dac biet [Edict 64/SL on the Establishment of Special Committee of Inspection], promulgated by Chu tich Chinh phu lam thoi [President of Provisional Government] (Oct. 10, 1945), available at <http://luatvietnam.vn> (Vietnam).

<sup>51</sup> See HIEN PHAP NAM 1946 [Constitution 1946], art. 67; HIEN PHAP NAM 1959 [Constitution 1959], art. 101; HIEN PHAP NAM 1980 [Constitution 1980], art. 133; HIEN PHAP NAM 1992 [Constitution 1992], art. 132; Constitution 2013, *supra* note 2, arts. 31, 103(7), available at <http://luatvietnam.vn> (Vietnam). The Constitution of 1946 was the first Constitution of Vietnam, and then it was replaced by the Constitutions of 1959, 1980, and 1992.

<sup>52</sup> See SAC LENH 13-SL VE TO CHUC CAC TOA AN VA NGACH THAM PHAN [Edict 13-SL on the Organizations of Courts and the Categories of Judges], promulgated by Chu tich Chinh phu lam thoi [President of Provisional Government] (Jan. 24, 1946), arts. 44, 46; SAC LENH 150-SL VE THANH LAP TOA AN DAC BIET O NHUNG NOI PHAT DONG QUAN CHUNG THI HANH CHINH SACH RUONG DAT [Edict 150-SL on the Establishment of the Special Courts Concerning Implementation of the Land Policy], promulgated by Chu tich nuoc [the President] (Apr. 4, 1953), art. 8, available at <http://luatvietnam.vn> (Vietnam).

<sup>53</sup> See LUAT TO CHUC TOA AN NHAN DAN NAM 1960 [Law on the Organization of the People's Court 1960], art. 7; LUAT TO CHUC TOA AN NHAN DAN NAM 1981 DUOC SUA DOI BO SUNG NAM 1988 [Law on the Organization of the People's Court 1980, amended in 1988], art. 9; LUAT TO CHUC TOA AN NHAN DAN NAM 1992 [Law on the Organization of the People's Court 1992], art. 9; LUAT SO 33/2002/QH10 VE TO CHUC TOA AN NHAN DAN [Law 33/2002/QH10 on the Organization of the People's Court], art. 9, available at <http://luatvietnam.vn> (Vietnam).

<sup>54</sup> See NGHI QUYET 03/2004/NQ-HDTP HUONG DAN THI HANH MOT SO QUY DINH TRONG PHAN THU NHAT "NHUNG QUY DINH CHUNG" CUA BO LUAT TO TUNG HINH SU NAM 2003 [Resolution 03/2004/NQ-HDTP Guidance on Implementing several Provisions in the First Part "General Provisions" of the Criminal Procedure Code 2003], promulgated by Hoi dong Tham phan Toa an nhan dan toi cao [the Justices' Councils of the Supreme People's Court], available at <http://luatvietnam.vn> (Vietnam).

Constitutions are the bases of other laws which specify or reconfirm the right of offenders to be defended.

- The defendant is entitled to conduct his or her own defence or ask lawyers;<sup>55</sup>
- The right to defence of the defendant is guaranteed;<sup>56</sup>
- The right to defence of the defendant is guaranteed. The defendant can either conduct his or her own defence or ask someone else;<sup>57</sup>
- The arrested, person held in custody, investigated, prosecuted or heard is entitled to conduct his or her own defence and ask lawyers or other people to defence;<sup>58</sup>

Based on the basic principles prescribed in the Constitutions, various laws have restated or specified the right to defence. Criminal procedure codes not only state this right as a fundamental principle but also specify it in articles about the rights of the arrested, the accused and the defendant. Specific contents of the right to defence have changed over time, as discussed below. However there are some similarities in that: Defendants can either conduct their own defence or ask someone else to do it; and defence counsels may be lawyers, people's advocates or lawful representatives of offenders.

Defence is recognised as a fundamental right of offenders. It is seen as an instrument to enhance the accuracy of criminal proceedings and protect the rights of citizens. In its guidelines, the Supreme People's Court (SPC) asserts that the right to a defence is the most important to defendants, so that the court has to guarantee that this right is adequately conducted and objectively evaluated.<sup>59</sup> However, the right to defence was not seen as a matter of human rights until the adoption of the Constitution of 1992. This is the first law of Vietnam to formally recognize the term "human rights,"<sup>60</sup> even though Vietnam had already signed several human rights treaties,<sup>61</sup> including the CRC. Since then, defence has become

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<sup>55</sup> See HIEN PHAP NAM 1946, *supra* note 51, art. 67.

<sup>56</sup> See HIEN PHAP NAM 1959, *supra* note 51, art. 101; HIEN PHAP NAM 1980, *supra* note 51, art. 133.

<sup>57</sup> See Constitution 1992, *supra* note 51, art. 132.

<sup>58</sup> See Constitution 2013, *supra* note 2, art. 31.

<sup>59</sup> See THONG TU 16-TANDTC VE TRINH TU XET XU SO THAM VE HINH SU [Circular 16-TANDTC on Procedures for First- Instance Trial], promulgated by Toa an nhan dan toi cao [the Supreme People's Court] (Sep. 27, 1974) in HE THONG HOA LUAT LE VE TO TUNG HINH SU DO TOA AN NHAN DAN TOI CAO DA BAN HANH DEN 32-12-1974 [the Systematization of legal documents on criminal procedures that the Supreme People's Court had promulgated to Dec. 31, 1974] (Vietnam).

<sup>60</sup> Although Vietnam had signed some human rights treaties before 1992, including the CRC, "human rights" were a politically sensitive topic in Vietnam, and did not appear in national legal documents until the Fourth Constitution of Vietnam in 1992. See, e.g., Kien Duy Tuong, *The Che Chinh tri – Phap quyen mot so Quoc gia: Xu huong va Tac dong den He thong Chinh tri Nuoc ta* [Political Mechanisms and the Rule of Law in several Countries: the Trend and Influence to Vietnam], N.C.L.P. 46, 51 (2005).

<sup>61</sup> E.g., Vietnam acceded to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination in 1981; the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966

more prominent and is seen as a vital tool to protect human rights, especially the rights of persons who are arrested, detained, and sentenced.

There have been several recent studies of human rights in Vietnam, conducted by both state institutions and independent researchers. The right to defence is very frequently mentioned, especially in studies which focus on human rights in the area of criminal procedure.<sup>62</sup> These researches at times reveal that Vietnamese legal practices on defence have not reached international standards in this field: there are inadequate mechanisms for implementation; and there are barriers to the right to defence in practice compared with the letter of the law. In other words, Vietnam needs to continue to improve mechanisms for the implementation of the right to defence.

### **B. Legal Changes in the Right to Defence of Juvenile Offenders from 1990**

As noted above, the criminal codes in North, Central and South Vietnam were different before the 1985 Code<sup>63</sup> and the 1988 Code<sup>64</sup> were introduced and came into force. In addition, Vietnam became a state party to the CRC in 1990, which requires Vietnam to carry out appropriate measures to realise the rights of the children, including the right to defence for juvenile offenders. Therefore, in this paper, the year 1990 is taken as a starting point in order to evaluate legal changes concerning juvenile offenders' right to defence.

First, it would be useful to introduce the key concepts which are used to indicate the offender in different stages of criminal proceedings; and to indicate persons who can conduct a defence in criminal proceedings. The key concepts are “person held in custody” (*nguoi bi tam giu*), “the accused” (*bi can*) and “the defendant” (*bi cao*).<sup>65</sup> The scope of these concepts is similar in the Code 1988 and Code 2003, except that “person held in custody” is defined differently in the two codes.

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International Covenant on Civil and Political Rights, and the 1979 International Convention on the Elimination of All Forms of Discrimination against Women in 1982.

<sup>62</sup> E.g., Chi Ngoc Nguyen, *Bao ve quyen con nguoi bang phap luat to tung hinh su* [Protection of human rights by criminal procedure law], Eco. L.S.J. 64-80 (2007); Hung The Dinh, *Bao ve quyen con nguoi bang Toa an* [The protection of human rights by court] presented at the Conference on Co che Bao dam Quyen Con nguoi [The Mechanisms for Protection of Human Rights] (Nov. 26-7, 2010); GOVERNMENT OF VIETNAM & UNITED NATIONS DEVELOPMENT PROGRAMME, THE 1ST LEGAL POLICY DIALOGUE IN 2012: “IMPROVEMENT OF LAWS ON HUMAN RIGHTS” (May 23, 2012).

<sup>63</sup> See Code 1985, *supra* note 23. This code came into force on Jan. 1, 1986.

<sup>64</sup> See Code 1988, *supra* note 24. This code came into force on Jan. 1, 1989.

<sup>65</sup> See generally Code 1988, *supra* note 24, Arts. 34, 38; Code 2003, *supra* note 34, Arts. 48–50.

Persons held in custody are persons arrested in urgent cases,<sup>66</sup> offenders caught red-handed against whom custody decisions have been issued, but criminal proceedings have not been initiated, as provided in the Code 1988.<sup>67</sup> This concept is re-defined in the 2003 Code with a wider scope: persons held in custody are persons arrested in urgent cases, offenders caught red-handed, persons arrested under pursuit warrants, offenders who have confessed or given themselves up, and against whom custody decisions have been issued (art. 48). The accused are defined as “persons against whom criminal proceedings have been initiated.”<sup>68</sup> Defendants are defined as “persons whom the courts have decided to commit for trial.”<sup>69</sup>

In the 1990s, the right to defence in general, and the right to defence of juvenile offenders in particular, were provided for in the Constitution 1980, the Law on the Organisation of the People’s Court 1981 as follows:

The right to defence of the defendant is guaranteed . . . .<sup>70</sup> The accused and defendants have the right to conduct their own defence or ask someone else to do it. In cases prescribed by law, courts shall appoint defence counsels for defendants.<sup>71</sup>

In comparison to the Constitution of 1980, the right to defence of criminal offenders is more broadly defined in the Law on the Organization of the People’s Court of 1981. This law also refers to the rights of the accused, before the courts have made a decision to try the offender.

In the 1988 Code, the right to defence is provided as a fundamental principle of criminal proceedings<sup>72</sup> and is specified and elucidated in various articles on the rights of the accused, the rights of the defendants (art. 34), the rights of defence counsels (art. 36), procedures for inquiry and argument at court sessions (arts 206-221), and some other related articles.

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<sup>66</sup> According to article 63/1 of the Code 1988, urgent arrests can be made in the following cases: a) when there exist grounds to believe that the person is preparing to commit serious crimes; b) when victims or persons present at the scenes where the crimes occurred saw with their own eyes and confirmed seeing who committed the crimes and it is deemed necessary to immediately prevent that person from escaping; and c) when traces of crime are found on the bodies or at the residences of the persons suspected of having committed the crimes and it is deemed necessary to immediately prevent such persons from escaping or destroying evidences.

<sup>67</sup> See Code 1988, *supra* note 24, art. 38.

<sup>68</sup> *Id.* at art. 34; Code 2003, *supra* note 34, art. 49.

<sup>69</sup> Code 1988, *supra* note 24, art. 35; Code 2003, *supra* note 34, art. 50.

<sup>70</sup> HIEN PHAP NAM 1980, *supra* note 51, art. 50.

<sup>71</sup> LUAT TO CHUC TOA AN NHAN DAN NAM 1981 DUOC SUA DOI BO SUNG NAM 1988, *supra* note 53, art. 9.

<sup>72</sup> See Code 1988, *supra* note 24, art. 12.

Juvenile offenders have the common rights of the accused or defendants and also have several special forms of support because of their immaturity.

Juvenile offenders can conduct their own defence or ask someone else to do it . . . .<sup>73</sup> Lawful representatives of the accused or defendants who are juveniles may select defence counsels or by themselves to defend the accused or defendants;<sup>74</sup>

The investigating bodies, procuracies, or courts must request bar associations to appoint a lawyer for the juvenile accused and defendants if they cannot give their own choice.<sup>75</sup> In these cases, the juvenile offenders and their lawful representatives still have the right to request the change of, or refuse to have, defence counsels.<sup>76</sup>

Any procedure-conducting bodies requesting bar associations to appoint a lawyer for a juvenile offender shall pay for the lawyers as prescribed by law; the lawyers must not require a payment from the juvenile offenders or their families.<sup>77</sup>

All offenders, including juvenile offenders, are afforded the following as part of their right to defence:<sup>78</sup>

- to be legally equal to prosecutors, defence counsel, victims, and those involved in the proceedings in giving evidence, requests, and arguments before the court;
- to be informed of the offences of which they have been accused;
- to present evidence and requirements during the resolution of the case;
- to request different procedure-conducting persons, expert witnesses, and interpreters;
- to receive all decisions concerning their offence, including decisions to institute criminal proceedings, written investigation reports, indictments, and decisions on their prosecution;

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<sup>73</sup> See *Id.*, art. 34.

<sup>74</sup> *Id.* arts. 37/2, 275.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* art. 37/2.

<sup>77</sup> THONG TU 108/2002/TTLT/BTC-BTP HUONG DAN VE CHE DO THU LAO VA CHI PHI CHO LUAT SU TRONG TRUONG HOP LUAT SU THAM GIA TO TUNG THEO YEU CAU CUA CO QUAN TIEN HANH TO TUNG [Circular 108/2002/TTLT/BTC-BTP on Guidance about Fees and Expenses for Lawyers participating judicial proceedings as requested by the procedure-conducting bodies], promulgated by Bo Tai chinh va Bo Tu phap [Ministry of Finance and Ministry of Justice], part III, available at <http://luatvietnam.vn> (Vietnam).

<sup>78</sup> Code 1988, *supra* note 24, arts. 20, 34; Code 2003, *supra* note 34, arts. 19, 50.

- to complain about relevant decisions of the investigating agencies and the procuracy;
- to participate and present arguments in the trial; and
- to appeal the judgment and decision of the court;
- When participating in criminal cases to defend the accused, defence counsels have the following rights:<sup>79</sup>
  - to take part in the procedure from the initiation of criminal proceedings against the accused;
  - to be present at the interrogation of the accused, to ask questions of the accused if allowed by the investigators; and to be present in other investigating activities;
  - to request different procedure-conducting persons, expert witnesses, and interpreters;
  - to present evidence and requirements;
  - to meet the accused in detention;
  - to read and take notes of the information stored in case files after the investigations;
  - to participate in the questioning and the arguments at the trial;
  - to be informed of the decisions regarding the end of the investigation, prosecution, and other related matters;
  - to receive the court's decision to bring the case to trial at least ten days before the court session<sup>80</sup>; and
  - to receive the verdict within fifteen days of the judgment.<sup>81</sup>
- At the same time, defence counsels are under the following obligations in order to ensure that the accused are defended adequately. They are:<sup>82</sup>
  - “to apply every measure prescribed by law to clarify details” in order “to prove the innocence of” the accused as well as arguing for “circumstances to mitigate the penal liability” of the accused<sup>83</sup>;

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<sup>79</sup> Code 1988, *supra* note 24, arts. 36; Code 2003, *supra* note 34, arts. 56-58.

<sup>80</sup> Code 2003, *supra* note 34, art. 182.

<sup>81</sup> *Id.* at art. 229.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at art. 58.



- “not to refuse to defend” the accused “whom they have undertaken to defend” without plausible reasons.<sup>84</sup>
- There are further provisions related to the defence of juvenile offenders:
- Defence counsels for juvenile offenders have the right to complain about relevant decisions of the procedure-conducting bodies, and appeal the judgment and decision of the court.<sup>85</sup>
- Where defence counsels are not present, the trial panel must postpone the trial.<sup>86</sup>

Under the 1988 Code, some of these regulations were interpreted by the procedure-conducting bodies, especially the SPC. The SPC has issued several documents concerning defence to guide local courts toward a consistent implementation of the law. Such documents refer to Official Dispatch 52/1999/KHXX<sup>87</sup>, which illuminates several provisions of the 1988 Code concerning about juvenile defendants<sup>88</sup>, and Official Dispatch 81/2002/TANDTC<sup>89</sup>, which explains when the court staff must be changed due to their relationship with defence counsels.<sup>90</sup>

The significance of the 1988 Code in Vietnam’s legal development is undeniable. However, after approximately fifteen years, it proved unsuitable, and was replaced by the 2003 Code, which has been in force since July 1, 2004.<sup>91</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> Code 1988, *supra* note 24, art. 36; Code 2003, *supra* note 34, art. 57-58.

<sup>86</sup> Code 1988, *supra* note 24, art. 165; Code 2003, *supra* note 34, art. 190.

<sup>87</sup> CÔNG VĂN 52/1999/KHXX CỦA TOÀ ÁN NHÂN DÂN TỐI CAO VỀ VIỆC THỰC HIỆN MỘT SỐ QUY ĐỊNH CỦA BỘ LUẬT TỔ TỤNG HÌNH SỰ ĐỐI VỚI BỊ CÁO LÀ NGƯỜI CHƯA THÀNH NIÊN [Official Dispatch 52/1999/KHXX on Implementation of several Articles of the Criminal Procedure Code Concerning Juvenile Defendants] (promulgated by the Supreme People’s Court, June 15, 1999), <http://luatvietnam.vn> (Vietnam) (An Official Dispatch (*Cong van*) is not a formal kind of legal normative documents recognized in the Law on the Promulgation of Legal Documents. It is usually used while addressing particular cases, but sometimes state agencies use official dispatches to communicate common policies or guidelines in certain issues within the same system).

<sup>88</sup> CÔNG VĂN 52/1999/KHXX CỦA TOÀ ÁN NHÂN DÂN TỐI CAO VỀ VIỆC THỰC HIỆN MỘT SỐ QUY ĐỊNH CỦA BỘ LUẬT TỔ TỤNG HÌNH SỰ ĐỐI VỚI BỊ CÁO LÀ NGƯỜI CHƯA THÀNH NIÊN [Official Dispatch 52/1999/KHXX on Implementation of several Articles of the Criminal Procedure Code Concerning Juvenile Defendants] (promulgated by the Supreme People’s Court, Jun, 15, 1999), <http://luatvietnam.vn> (Vietnam).

<sup>89</sup> CÔNG VĂN 81/2002/TANDTC CỦA TOÀ ÁN NHÂN DÂN TỐI CAO VỀ VIỆC GIẢI ĐÁP CÁC VẤN ĐỀ VỀ NGHIỆP VỤ [Official Dispatch 81/2002/TANDTC on Answering several Questions on Courts’ Tasks] (promulgated by the Supreme People’s Court, Jun. 10, 2002), <http://luatvietnam.vn> (Vietnam).

<sup>90</sup> *Id.*

<sup>91</sup> NGHỊ QUYẾT 24/2003/QH11 VỀ VIỆC THI HÀNH BỘ LUẬT TỔ TỤNG HÌNH SỰ [Resolution No. 24/2003/QH11 of Nov. 26, 2003 on the Implementation of the Criminal Procedure Code] (promulgated by the National Assembly, Nov. 26, 2003), <http://www.moj.gov.vn> (Vietnam).

With respect to defence, the 2003 Code presents several new regulations and amended articles, while retaining some of the provisions set forth in the 1988 Code.

The first significant change is that the 2003 Code recognizes the right to defence of persons held in custody. This is a new development, not mentioned in the 1988 Code. The 2003 Code states that those held in custody shall have the right to conduct their own defence or to “ask other persons to defend them.”<sup>92</sup> In addition, the lawful representatives of juveniles kept in custody may select counsels to conduct defence or provide their own defence of the juveniles kept in custody.<sup>93</sup>

Article 305 of the 2003 Code also expands the categories of those who can be assigned to defend juvenile offenders at the request of the procedural bodies.

- Lawful representatives of the juvenile offenders may select defence counsels or may themselves defend “the persons kept in custody, the accused or defendants”;
- “Where the accused or defendants are minors or their lawful representatives refuse to select defence counsels for them,” the procedure-conducting bodies “must request bar associations to assign lawyers’ offices to appoint defence counsels for them or propose the Vietnam Fatherland Front Committee or the Front’s member organizations to appoint defence counsels for their organizations’ members.”<sup>94</sup>

The change in the scope of who can be appointed as defence counsels as requested by procedure-conducting bodies has provoked some controversy. According to Hai Hong Pham, this provision confirms the role of the Vietnam Fatherland Front, the most comprehensive organization participating in criminal proceedings.<sup>95</sup> Bay Van Tran argues that the Vietnamese government should provide more support for people’s advocates to serve as

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<sup>92</sup> Code 2003, *supra* note 34, art. 11, 48/1/d.

<sup>93</sup> *Id.* at art. 305.

<sup>94</sup> *Id.* According to the Constitution 1992, “the Vietnam Fatherland Front and its member organizations constitute the political base of people’s power. The Front promotes the tradition of national solidarity, strengthens the people’s unity in political and spiritual matters, participates in the building and consolidation of the people’s power, works with the State for the care and protection of the people’s legitimate interests, encourages the people to exercise their rights to mastery, ensures the strict observance of the Constitution and the law, and supervises the activities of the state organs, elected representatives, and state officials and employees . . . .” (art. 9). At the present, the Vietnam Fatherland Front consists of 44 members. *See generally*: <http://www.mattran.org.vn/> (last visited 13 Apr. 2014) (the Vietnam Fatherland Front website).

<sup>95</sup> *See* Hai Hong Pham, *Nhung diem moi ve Trach nhiem va Nghia vu cua Ngauoi bao chua trong Bo luat to tung hinh su nam 2003* [New features of Defence Counsels’ Responsibilities and Obligations in the Criminal Procedure Code 2003] in the Material for the Conference about Human Rights 183-4 (2005).

defence counsels.<sup>96</sup> However, there is also a concern that it may reduce the quality of the defence if the appointed defence counsel is not a lawyer, and does not have the professional skills to provide adequate defence. Several lawyers argue that the law should regulate only lawyers and exclude the people's advocates who would be eligible to provide conduct defence counsels.<sup>97</sup> This means that these lawyers do not believe that people's advocates should serve as defence counsels. Although the quality of the defence provided conducted by professional lawyers could be more effective, there may not be enough lawyers available to serve as defence counsels, especially in the situation that the number of lawyers is very low compared to the population and the availability of lawyers is not always adequate; especially in rural, mountainous, and isolated areas, where the number of lawyers is not sufficient for conducting appointed defence counsels in statutory cases.<sup>98</sup> Therefore, expanding the category of people who can be appointed as defence counsels can contribute to a better protection of the offenders' right to defence.

A further change is concerned with the certificate of defence counsels. Both the 1988 and 2003 Codes require the defence counsels to present a certificate showing that their participation in criminal proceedings has been approved by the procedure-conducting bodies while defending particular offenders. Nevertheless, the 1988 Code did not specify the time and relevant responsibilities of the procedural bodies in this approval.<sup>99</sup> Sometimes lawyers complained that the provision for granting such certificates lacked clarity, contributing to delay, and there were cases of refusal by procedure-conducting bodies without plausible reasons.<sup>100</sup>

In the 2003 Code, the period of time in which procedure-conducting bodies must grant the defence certificates is clearly stated in the article 46.

Within three days from the date of receiving the requests of the defence counsel enclosed with necessary papers related to the defence, the procedure-conducting bodies must consider and certify the defense counsel

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<sup>96</sup> See Bay Van Tran, *Người bảo chữa và Nhung van de Bảo đảm Quyền của Người bảo chữa trong To tụng hình sự* [Defence Counsels and the Guarantee of the Rights of Defence Counsels in Criminal Procedure] in the Material for the Conference about Human Rights 194, 205 (2005).

<sup>97</sup> Đỗ Ngọc Thịnh et al., *Đã đến lúc bỏ bào chữa viên nhân dân* [It is time for removing institution of People's Advocate], BÁO MÔI.COM, Oct. 2, 2012, <http://www.baomoi.com/Da-den-luc-bo-bao-chua-vien-nhan-dan/58/7850689.epi>.

<sup>98</sup> BỘ TƯ PHÁP, BAO CAO TONG KET 5 NAM THI HANH LUAT LUAT SU [The Report on the Review of the Five-year Implementation of the Law on the Lawyer] Ministry of Justice at 15-7 (2012).

<sup>99</sup> See 1988 Code, *supra* note 24, art. 35.

<sup>100</sup> See Pham H., *supra* note 95, at 190.

so that they can perform the defence. If refusing to certify the counsel, the procedure-conducting bodies must clearly state the reason.

In case of keeping persons in custody, within 24 hours from the time of receiving the requests of the defense counsels enclosed with the papers related to the defence, the investigating bodies must consider and certify the defence counsel so that they can perform the defence. If they refuse to certify the counsel they must clearly state the reason.

This regulation has improved the situation for defence counsels, who can obtain certification more easily than before.<sup>101</sup>

The 2003 Code also supplements several rights of defence counsels, including the rights: to request investigating bodies to inform them in advance of the time and place of interrogating the accused so as to be present at interrogation (art. 58/2/b), to read the minutes of the proceedings in which they have participated, and procedural decisions related to the persons whom they defend (art. 58/2/a), to collect documents, objects and details related to their defence from the persons in custody, the accused, defendants, their next of kin or from agencies, organizations and individuals at the requests of the persons in custody, the accused or defendants (art. 58/2/d), to copy records in the case files, which are related to the defence, after the termination of investigation according to the provisions of the law (art. 58/2/g), and to question witnesses, victims, and other persons with interests and obligations related to the cases or their lawful representatives at the trial (arts. 210, 211).

These amendments have provided a noticeable improvement in the rights of defence counsels, which allows them to better defend the offenders. Under Article 58/3/a of the Code 2003, defence counsels have an additional obligation compared with the Code 1988; that is, to provide procedure-conducting bodies with relevant materials. When collecting documents and/or objects related to the cases, defense counsels shall deliver them to procedure-conducting bodies. The delivery and receipt of such documents and objects must be recorded..

Overall, it can be seen that the new obligations of defence counsels allow them to carry out their jobs more effectively. Documents or objects collected by defence counsels can become evidence in the criminal case, something which is usually seen as only belonging

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<sup>101</sup> *Id.*

to procedure-conducting bodies under the 1988 Code. Accordingly, when providing details proving the innocence or circumstances mitigating the penal liability of offenders and delivering them to procedure-conducting bodies, defence counsels are better able to protect their clients.

The 2003 Code has thus made noteworthy changes in defence, which can enhance defence in general, and the right to defence of juvenile offenders in particular. One of the most famous lawyers in the field of criminal justice in Vietnam, Professor Hai Hong Pham, has commented on this issue:

The 2003 Code creates a legal framework contributing to ensuring the effective practice of lawyers. The new regulations are appropriate with national economic, political and social conditions, and at a certain level satisfy the requirements for constructing the justice system with democracy, equality and humanity.<sup>102</sup>

Since the 2003 Code entered into effect, the SPC and relevant agencies have issued several legal normative documents to clarify issues regarding the right to defence of juvenile offenders.

- Resolution No. 03/2004/NQ-HDTP: Guidance on Implementing several Provisions in the First Part “General Provisions” of the Criminal Procedure Code 2003;<sup>103</sup>
- Joint Circular No. 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC: Guidance on Legal Assistance in Proceedings;<sup>104</sup>
- Circular No. 70/2011/TT-BCA: Interpretation on provisions of the Criminal Procedure Code relating to the Guarantee of the Right to Defense in the Investigation of Criminal Cases;<sup>105</sup>

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<sup>102</sup> Pham H., *supra* note 95, at 190-191.

<sup>103</sup> NGHỊ QUYẾT 03/2004/NQ-HDTP HUƠNG DẶN THI HẠNH MỘT SỐ QUY ĐỊNH TRONG PHẦN THỨ NHẤT “NHỮNG QUY ĐỊNH CHUNG” CỦA BỘ LUẬT TỐ TỤNG HÌNH SỰ NĂM 2003 [Resolution 03/2004/NQ-HDTP Guidance on Implementing several Provisions in the First Part “General Provisions” of the Criminal Procedure Code 2003], promulgated by Hội đồng Tham phán Tòa án nhân dân tối cao [the Justices’ Councils of the Supreme People’s Court], *available at* <http://luatvietnam.vn> (Vietnam).

<sup>104</sup> THÔNG TƯ LIÊN TỊCH 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC HUƠNG DẶN ẠP DỤNG MỘT SỐ QUY ĐỊNH VỀ TRỢ GIÚP PHÁP LÝ TRONG HOẠT ĐỘNG TỐ TỤNG [Joint Circular 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC on Guidance for Legal Assistance in Proceedings], promulgated by the Ministry of Justice, Ministry of Public Security, Ministry of Defence, Ministry of Finance, Supreme People’s Procuracy and Supreme People’s Court, *available at* <http://luatvietnam.vn> (Vietnam).

- Joint Circular No. 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXH: Guiding a number of Provisions of the Criminal Procedure Code on Minor Procedure Participants.<sup>106</sup>

With respect to the above legal documents, there has been criticism that the requirements for granting a defence certificate cause some difficulties for defence counsels.<sup>107</sup> These instruments, however, always confirm the right to defence of juvenile offenders, and, moreover, they provide some clarification.

The lawful representatives of juvenile offenders may select defence counsels according to law or themselves defend the offenders;

Procedure-conducting bodies must request a defence counsel for the juvenile offender while dealing with a juvenile crime in all three stages of criminal proceedings – investigation, prosecution and trial – if offenders and their lawful representatives cannot select defence counsels; except where the offenders or their lawful representatives decline the right to have a defence counsel;

If the accused, defendants or their lawful representatives refuse defence counsels, minutes of the refusal shall be made and kept in case files;

Defence counsels appointed on request by procedure-conducting bodies receive payment from the agency requesting and must not receive any from the juvenile offenders or their families.

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<sup>105</sup> THONG TU 70/2011/TT-BCA QUY DINH CHI TIET THI HANH CAC QUY DINH CUA BO LUAT TO TUNG HINH SU LIEN QUAN DEN VIEC BAO DAM QUYEN BAO CHUA TRONG GIAI DOAN DIEU TRA VU AN HINH SU [Circular No. 70/2011/TT-BCA Interpretation on provisions of the Criminal Procedure Code relating to the Guarantee of the Right to Defence in the Investigation of Criminal Cases], promulgated by the Ministry of Public Security, *available at* <http://luatvietnam.vn> (Vietnam) [hereafter: THONG TU 70/2011/TT-BCA].

<sup>106</sup> THONG TU LIEN TICH NO. 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXHG HUONG DAN THI HANH MOT SO QUY DINH CUA BO LUAT TO TUNG HINH SU DOI VOI NGUOI THAM GIA TO TUNG LA NGUOI CHUA THANH NIEN [Joint Circular No. 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXHG Guiding a number of Provisions of the Criminal Procedure Code on Juvenile Procedure Participants], promulgated by the Supreme People's Procuracy and Supreme People's Court, Ministry of Public Security, Ministry of Justice and Ministry of Labour - Invalids and Social Affairs, *available at* <http://luatvietnam.vn> (Vietnam).

<sup>107</sup> *E.g.*, Thanh Thi Ha, Nhung Bat cap ve viec Cap giay Chung nhan bao chua cua Luat su trong Vu an Hinh su [The Inadequacy in Grant for a Defence Certificate to Lawyers in Criminal Cases], Oct. 7, 2011, *available at* [http://liendoanluatsu.org.vn/index.php?option=com\\_content&view=article&id=621%3Anhng-bt-cp-v-vic-xin-cp-giy-chng-nhn-ngi-bao-cha-ca-lut-s-trong-v-an-hinh-s&catid=79%3Ahanh-nghe-luat-su&Itemid=75&lang=vi](http://liendoanluatsu.org.vn/index.php?option=com_content&view=article&id=621%3Anhng-bt-cp-v-vic-xin-cp-giy-chng-nhn-ngi-bao-cha-ca-lut-s-trong-v-an-hinh-s&catid=79%3Ahanh-nghe-luat-su&Itemid=75&lang=vi).

Comparing these provisions with the requirements and recommendations concerning legal assistance for the children alleged as or accused of having infringed the penal law in the CRC<sup>108</sup>, the Beijing Rules<sup>109</sup> and the General Comment No.10,<sup>110</sup> it can be concluded that, in this respect, Vietnam's legislation probably matches international standards.

In summary, with a long history, amendments in the 2003 Code, and further resolutions, circulars and joint circulars, we can confirm that, from 1990 to the present, Vietnamese law has changed dramatically and significantly in terms of the right to defence of offenders and particularly juvenile offenders.

To evaluate the practical effect of juvenile offenders' right to defence, in the next section, I will report on the implementation of the right to defence of juvenile offenders in practice.

### **III. PRACTICES CONCERNING THE RIGHT TO DEFENCE OF JUVENILE OFFENDERS**

#### **A. Relevant Statistics**

Vietnamese legal normative documents clearly show that defence counsels can be lawyers, legal representatives of offenders, or people's advocates. However, in practice, defence in criminal proceedings is normally conducted by lawyers. When offenders and their lawful representatives can afford to select defence counsels, they mostly choose lawyers to conduct the defence. Generally lawyers are the persons who possess extensive legal knowledge, being trained in professional skills of defence, and having experienced legal probation or practice for a time period as stipulated by the Law on Lawyers of 2006.<sup>111</sup> Thus, their defence is often presumed to be more effective than that of others.

However, in Vietnam there are no available official reports, statistics, or study on the proportion of cases in which defence counsels are lawyers or other categories. In fact, the

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<sup>108</sup> See CRC, *supra* note 9, art. 40/2.

<sup>109</sup> See Beijing Rules, *supra* note 15, rule 17.

<sup>110</sup> See Committee on the Rights of the Child, *supra* note 16, paragraphs 48-49.

<sup>111</sup> See LUAT 65/2006/QH11 VE LUAT SU [Law 65/2006/QH11 on Lawyers], available at <http://luatvietnam.vn> (Vietnam). This Law provides numerous criteria for a person to become a lawyer, consisting of possessing a bachelor of laws, being trained in the legal profession, having gone through the probation of legal profession, and passing the test of law practice-probation results of the Ministry of Justice and the national lawyers' organization (arts. 10-21).

data reflecting professional activities of lawyers or defence counsels has not been regularly collected, summarized, or disseminated.

According to the Ministry of Justice's report<sup>112</sup> of May 2011, bar associations have been established in 62 out of 63 provinces and cities in the whole country with 7072 lawyers and about 3500 law probationers, an increase of 250.78% compared with five years ago. Of this number, about 20 lawyers have trained in the organization of foreign lawyers in Vietnam; seven Vietnamese lawyers received legal training abroad and are recognized as lawyers in the host countries, namely the United States, Australia and France.<sup>113</sup> According to this report (as well as lawyers and researchers) the quantity and quality of lawyers have seen significant development; the effectiveness of the legal profession has also improved.<sup>114</sup>

Nonetheless, there is neither official data about the number of people's advocates nor reliable evaluation concerning the usefulness of their defence. The criteria for becoming a people's advocate are also indefinite and nebulous. Currently, no legal document provides criteria for a people's advocate. To obtain a defence certificate – which shows that the defence counsel is accepted by the procedure-conducting bodies to attend the criminal proceedings to defend the offender – defence counsels have to present several relevant papers. According to Circular No. 70/2011/TT-BCA of the Ministry of Public Security on the Interpretation on provisions of the Criminal Procedure Code relating to the Guarantee of the Right to Defence in the Investigation of Criminal Cases, it is required that:

When requesting a certificate for defence counsels, people's advocates must present four documents including the identity card, the written recommendation of the Committee of the Vietnam Fatherland Front or the Front's member organizations where the offender is a member; and the paper indicating the people's advocate appointed by the Vietnam Fatherland Front Central Committee or its member organizations.<sup>115</sup>

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<sup>112</sup> Bo Tu phap, *supra* note 98, at 3.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.* at 3; *see also* Tran, *supra* note 96, at 200. *See generally* Chien Van Nguyen, Tham luan Luat Luat su sau 5 nam thuc hien: Kho khan, vuong mac cua luat su trong qua trinh hanh nghe [Memoir about the Law on Lawyers after five years of implementation: Difficulties and problems confronting the lawyer in the course of practice], Dec. 22, 2011, *available at* [http://liendoanluatsu.org.vn/index.php?option=com\\_content&view=article&id=684%3Athem-lun-lut-lut-s-sau-05-nam-thuc-hien-qkho-khn-vng-mc-ca-lut-s-trong-qua-trinh-hanh-nghe&catid=79%3Ahanh-nghe-luat-su&Itemid=75&lang=vi](http://liendoanluatsu.org.vn/index.php?option=com_content&view=article&id=684%3Athem-lun-lut-lut-s-sau-05-nam-thuc-hien-qkho-khn-vng-mc-ca-lut-s-trong-qua-trinh-hanh-nghe&catid=79%3Ahanh-nghe-luat-su&Itemid=75&lang=vi).

<sup>115</sup> THONG TU 70/2011/TT-BCA, *supra* note 105, art. 6.



With regard to the practice of defence, the Ministry of Justice's report also reveals that, based on summarized reports from 59 out of 64 Bar Associations in the whole country, from 2007 to 2011 lawyers had participated in 64,173 criminal cases, including 32,752 cases conducted at clients' request and 31,421 cases conducted by requests from procedure-conducting bodies.<sup>116</sup> At the same time, the report of the Supreme People's Court discloses that, from 2007 to 2011, in criminal justice, lawyers were involved in more than 64,000 out of 299,574 total court trials, accounting for 21.44%, of which ten percent conducting the defence were directly selected by offenders or their lawful representatives. In all of the cases where appointed defence counsels were requested, the defence was conducted by lawyers,<sup>117</sup> or there is no cases defended by Peoples' Advocates or the juvenile offenders' lawful representatives.

These statistics on the practice of defence from reports of the Ministry of Justice and the Supreme People's Court showing the rate of criminal cases having the lawyers' attendance should be understood to include all of the lawyers involved in criminal cases with the role of defence counsels of offenders, and also the defence counsels of other involved parties, namely victims, civil plaintiffs and civil defendants. In the SPS report, the term 'lawyers' denotes 'defence counsels' – all the persons who conduct defence in courts, embodying lawyers, people's advocates and lawful representatives of offenders. The reason for this comment is that the Supreme People's Court makes no distinction between lawyers and non-lawyers conducting defence in this report. There are, in fact, non-lawyers who are appointed to defend offenders. Examples can be taken from selected case studies. Looking at table 2 and the three cases discussed, it can be seen that in several cases there is no involvement of lawyers. In one case (discussed case 1 in Section III/B- Selected Case Studies Concerning Juvenile Offenders), the defence counsel is a people's advocate, while all the other cases, where the juvenile offenders and their lawful representatives refused an appointed defence counsel (including discussed case 3 in Section III/B), the representatives were recognized as defence counsels. In such cases, the lawful representatives were counted as lawyers defending juvenile offenders as requested by procedure-conducting bodies in relevant reports of the court.

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<sup>116</sup> Bo Tu phap, *supra* note 98, at 5.

<sup>117</sup> BAO CAO CUA CHANH AN TOA AN NHAN DAN TOI CAO NHIEM KY 2007-2011 [the Report of the Chief Judge of the Supreme People's Court term 2007-2011] toa an nhan dan toi cao [Supreme People's Court] (2012).

**Table 1:**

**Court Cases Involving Juvenile Offenders  
and Numbers of Juvenile Offenders**

between 2007 and 2011<sup>118</sup>

Source: the Supreme People's Court

Years	Court Cases		Offenders	
	Total	Juvenile cases	Total	Juvenile Offenders
2007	55,299	2689	99,260	3747
2008	58,499	2744	98,741	3900
2009	60,433	2722	102,577	3710

<sup>118</sup> These statistics concern the number of cases and offenders in the first-instance trial with the aim to distinguish this from the number of cases and offenders involved in appellate trials.

2010	52,595	2582	88,147	3418
2011	57,279	2355	97,961	3243

Regarding the situation of juvenile offenders tried in courts, according to annual statistics of the Supreme People's Court from 2007 to 2011, the number of juvenile offenders judged in the first instance trial is around 3,500 per year, while the total number of criminal offenders is about 57,000.<sup>119</sup> However, there are ambiguities in the implementation of the right to defence for juvenile offenders. There is scant information elucidating the practical performance of defending juvenile offenders except for some general evaluations such as “in 100 percent of the cases where the court requested an appointed defence counsels, lawyers have been involved,” as mentioned above.

The available reports from the SPS and the Ministry of Justice, the state agencies mainly responsible for the guidance, statistics, and evaluation on the implementation of the law concerning the defence, show that the data reflecting the situation of defending juvenile offenders in Vietnam is poor and quite cursory. Detailed information about the implementation of the right to defence of juvenile offenders has not been collected. There are no statistics on whether all the cases where procedure-conducting bodies requested appointed defence counsels were conducted by lawyers or by people's advocates; whether juvenile offenders relinquished the right to have an appointed defence counsel; or whether they were defended by the lawyers under their selection or by their lawful representatives. This means that it is difficult to rely solely on available reports by state agencies to evaluate the situation of the implementation of the rights to defence of juveniles involved in criminal procedures.

From recent studies, there are complaints that lawyers are often not welcomed by the procedure-conducting bodies.<sup>120</sup> Many lawyers have experienced difficulties while requesting certification, contacting offenders held in custody, or copying related documents

<sup>119</sup> After the first-instance trials, the cases can be called the appellate trial when the first-instance judgment is appealed or protested against before they become legally valid.

<sup>120</sup> E.g., Tuyen Minh Pham, *Mot so van de ve bao dam quyen bao chua cua nguoi bi tam giu, bi can, bi cao trong Luat to tung hinh su nam 2003* [Several issues concerning the right to defense of persons held in custody, the accused and defendants in criminal law in 2003], 2007 The Peop. C.J. 27, 28; Quy Thai Pham, *Trao doi ve che dinh quyen bao chua trong phap luat to tung hinh su* [Some discussion on the right to defence in criminal law], 2008 The Peop. C.J. 35, 36; Thuy Thu Thi Le, *Cai cach tu phap o Viet Nam: Mot so vuong mac can duoc thao go* [Judicial Reform in Vietnam: some problems to be solved], 2006 Stat. L.J. 66, 68. Hien Van Nguyen, *Thuc trang vai tro cua luat su trong tranh tung tai cac phien toa hinh su o nuoc ta trong thoi gian qua* [Current situation of Lawyers' role in criminal trails], 2010 Stat. L.J. 62, 64.

in case files.<sup>121</sup> Moreover, it is also believed that lawyers' views and recommendations have been evaluated negatively, or have even been ignored by procedure-conducting bodies.<sup>122</sup> These complaints may, however, come from the lawyers who are directly selected by offenders or offenders' lawful representatives. They usually execute their tasks with real enthusiasm and responsibility commensurate with the remuneration received from their clients.

In the case of juvenile offenders, most defence counsels are appointed by bar associations based on requests from procedure-conducting bodies. At a certain level it can be assumed that appointed lawyers not only defend offenders, but also "help" procedure-conducting bodies to avoid violations of the law and the exclusion of wrongfully-obtained evidence. This is because the absence of defence counsel when solving juvenile offenses can be considered as a serious violation of the law, and may result in a re-investigation or re-trial of the case.<sup>123</sup> According to Quy Thai Pham, since the Investigation Police Office of the Ministry of Public Security and the Supreme People's Court respectively issued Official Dispatches No. 45/C16(P6), dated 26/01/2007,<sup>124</sup> and No. 26/KHXX, dated 28/02/2007,<sup>125</sup> which strictly required the guarantee of the right to defence of offenders, in several cases, investigating bodies had implored defence counsels to sign interrogating minutes.<sup>126</sup> Pham Q. also reveals that the appearance of these Official Dispatches caused a storm of returning files and cancellations of the first-instance trial for additional or re-investigation, until the

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<sup>121</sup> E.g., Hoài Trung Phan, *Thuc trang va dinh huong hoan thien phap luat nham bao dam quyen cua luat su tham gia tranh tung trong vu an hình sự* [The current situation of, and orientation to improvement of, the law to ensure the right of lawyers in criminal proceedings], in the Material for the Conference about Human Rights 206, 211-212 (2005); Pham, *supra* note 95, at 201-202; Nguyen H., *supra* note 120; Nicholas Booth, *Implementing Human Rights in Practice - some Observation*, The 1st Legal Policy Dialogue in 2012: "Improvement of Laws on Human Rights" 32, 33-4 (2012).

<sup>122</sup> E.g., Code 2003, *supra* note 34, at 203; Dat Tien Nguyen, *Dam bao quyen cua nguoi bi tam giam, bi can, bi cao trong to tung hình sự Viet Nam* [Guarantee the rights of person held in custody, the accused and defendants in Vietnam's criminal procedure] The Peop. C.J. 4, 7 (2007).

<sup>123</sup> See Code 2003, *supra* note 34, arts. 57/2, 168/3, 179/1/c, 250, 305; THONG TU LIEN TICH 01/2010/TTLT-VKSNDTC-BCA-TANDTC HUONG DAN CAC QUY DINH CUA BO LUAT TO TUNG HINH SU VE TRA HO SO DE DIEU TRA BO SUNG [Joint Circular 01/2010/TTLT-VKSNDTC-BCA-TANDTC Guiding the Implementation of the Provisions of the Criminal Procedure Code on Returning the File for Additional Investigation], promulgated by the Supreme People's Procuracy, Ministry of Public Security and Supreme People's Court, art. 4/2/b, *available at* <http://luatvietnam.vn> (Vietnam).

<sup>124</sup> CONG VAN SO 45/C16(P6) [Official Dispatches No. 45/C16(P6)] thu truong Co quan Canh sat Dieu tra Bo Cong an [the Investigation Police Office of the Ministry of Public Security], (Jan. 26, 2007).

<sup>125</sup> CONG VAN SO 26/KHXX [Official Dispatches No. 26/KHXX], toa an nhan dan toi cao [Supreme People's Court], (Feb. 28, 2007).

<sup>126</sup> Quy Thai Pham, *Trao doi ve che dinh quyen bao chua trong phap luat to tung hình sự* [Some discussion on the right to defence in the criminal law], 2008 T. C. T. A. 35, 36.

Official Announcement No. 752(C16/(P6)),<sup>127</sup> dated 18/7/2007, was introduced with some changes.<sup>128</sup>

The appointed lawyers accordingly are not likely to face difficulties while in contact with procedure-conducting bodies. Moreover, appointed lawyers are under little pressure from offenders or their lawful representatives. This leads to a state where appointed lawyers may not endeavour to find the best evidence to protect offenders. Recent studies disclose that the implementation of the right to defence of juvenile offenders is somewhat formalistic.

The Children's Legal Centre and Booth also finds that there is a very high risk of procedure-conducting bodies recommending offenders, including juvenile offenders and their families, to refuse appointed defence counsels or to conduct the defence by themselves or by the legal representative of juvenile offenders.<sup>129</sup> At that time, Phan points out that the investigating bodies invite advocates and guardians to participate in the course of interrogating juveniles involved in criminal proceedings as the law prescribes in a perfunctory way, or even omit that duty.<sup>130</sup> Normally, as regulated by the law, advocates and guardians only sign interrogational minutes when they attend the interrogation. However, sometimes advocates and guardians sign supplied minutes to legitimise the process of the interrogation and investigation, but without having real participation.<sup>131</sup> The Children's Legal centre found that there are advocates who have not studied case files and who participate in court trials without saying anything from beginning to end.<sup>132</sup>

It can thus be seen that there are different opinions on the guarantee of the right to defence between procedure-conducting bodies and others. To be able to perform a reasonable evaluation of the implementation of the right to defence of juvenile offenders, data needs to be collected and classified into groups according to various criteria, including:

- the total number of juvenile offenders;

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<sup>127</sup> THONG BAO SO 752/C16(P6) [Official Announcement No. 752 45/C16(P6)] thu truong Co quan Canh sat Dieu tra Bo Cong an [the Investigation Police Office of the Ministry of Public Security], (Jul. 18, 2007).

<sup>128</sup> Pham Q., *supra* note 126, at 39.

<sup>129</sup> See Children's Legal Centre, BAO CAO DANH GIA CAC QUY DINH CUA BO LUAT HINH SU LIEN QUAN DEN NGUOI CHUA THANH NIEN VA THUC TIEN THI HANH [An assessment Report into the provisions relating to juveniles of the Penal Code and practical implementation] 44 (2010); BOOTH, *supra* note 121, at 34.

<sup>130</sup> See Mai Thanh Thi Phan, *Mot so y kien ve viec Thanh lap Toa an gia dinh va Nguoi chua thanh nien o Vietnam* [Several Comments on the Establishment of the Juvenile and Family Court in Vietnam] in Toa an nhan dan toi cao; BAO CAO TONG QUAN VE CO SO LY LUAN VA THUC TIEN CUA SU CAN THIET THANH LAP TOA AN CHUYEN TRACH DOI VOI NGUOI CHUA THANH NIEN O VIET NAM [General Report on Theoretic and Practical Rationale of the Need for Establishing Specialized Courts for Juveniles in Vietnam] 173, 177 (UNICEF Viet. ed.)(2012).

<sup>131</sup> *Id.* at 179.

<sup>132</sup> Children's Legal Centre, *supra* note 129, at 44.

- the number of cases where juvenile offenders or their lawful representatives actively select defence counsel;
- the number of cases where legal representatives of the juvenile offenders conduct the defence;
- the number of cases where juvenile offenders and their lawful representatives refuse the defence counsel with reasons indicated;
- the number of cases where the procedure- conducting bodies request defence counsel;
- defence counsels categorised into three different groups of lawyers, Peoples' advocates, and lawful representatives.

### **B. Selected Case Studies Concerning Juvenile Offenders<sup>133</sup>**

Here, I examine selected case studies concerning the defence of juveniles from the files of criminal proceedings. I have had full access to court transcripts while studying these cases. Table 2 provides a very brief summary about the offenders, deterrent measures, defence counsel, and sentences. A discussion of three selected cases follows.

There are several abbreviations used in Table 2:

**Offences:** Off.

**Article of the Penal Code:** P.C. art.

**Offender's name:** Offender

**Birthdate:** Bd.

**Lawful Representative:** L.R.

**Defence Counsel:** DC

**Sentence:** S. **Deterrent Measures:** showing information about kind of measures, date and length of decision;

**Date of Offense, Initiation of Criminal Proceedings against the Accused, and Court Trial:** showing the date of the incident;

**Age of the offender, accused and the defendant** [Age: (y/m/d)] is counted since their date of birth to the date Date of Offense, Initiation of Criminal Proceedings against the Accused, and Court Trial, (y/m/d)

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<sup>133</sup> Vietnam has a civil legal system. Court cases are addressed independently, without referring to others as precedent. In order to protect the privacy of people involved in these cases, identifying information is disguised.

**Table 2:**  
**Summary of Ten Court Case Files Concerning Juvenile Offenders**

Offences Article of the Penal Code & Date of offenses	Offender's name, Birthdate & Age of the Offender (Age)	Date of Initiation of Proceedings (Date) & Age of the Accused (Age.)	Deterrent Measures: kind and time	Lawful Representatives & Defence Counsels	Date of Trial (Date), Age of the Defendant (Age) & Sentence (S.)	Comments
Off: Plundering property, Art.133 of PC Date: 04/3/2010	Offender: A Bd.: 11/01/1994 Age: 16 y. 2 m. 13 d.	Date: 08/03/2010 Age: 16 y. 2 m. 13 d.	Urgent arrest: 04/3/2010 (23:05 p.m.)  Custody: 3 days: 5- 8/3/2010  Temporary detention: 140 days  8/3/2010- 28/7/2010	LR: the offender's father appeared in the trial.  DC: appointed lawyer  Attending point: 5/3/2010 (00:05 a.m.)	Date: 27/5/2010  Age: 16 y. 4 m. 16 d.  S.: 5 years imprisonment	Documents show that the lawyer had participated in the criminal proceedings before the investigati ng body issued a request for, and a certificate for the appointed defence counsel.
	Offender: B Bd.: 06/03/1994 Age: 15 y. 11 m. 28 d.	Date: 08/03/2010 Age: 15 y. 11 m. 28 d.	Urgent arrest: 05/3/2010  Custody: 3 days  Temporary detention: 140 days  8/3/2010- 28/7/2010	LR: the offender's mother appeared in the trial.  DC: appointed lawyer Attending point: 5/3/2010 (14:25 p.m.).	Date: 27/5/2010  Age: 16 y. 2 m. 16 d.  S.: 4 years imprisonment	
OF: Stealing Property, Art.138 of PC Date: 04/3/2011	Offender: C Bd.: 15/12/1993 Age: 16 y. 3 m. 19 d.	Date: 05/04/2011 Age: 16 y. 3 m.. 23 d. .	Red-handed arrest: 03/04/2011  Custody: 3 days  Temporary detention: 173 days	LR: an officer of the Vietnam Fatherland Front Committee.  DC: appointed lawyer; Attending point: court trial	Date: 12/7/2011  Age: 16 y. 7 m. 27 d.  S.: 6 months imprisonment	
OF: Property Robbery by Snatching, Art.136 of PC	Offender: D Bd.: 24/3/1993 Age: 17 y. 11 m. 26 d.	Date: 24/03/2011 Age: 18y. 0 m. 0 d.	Red-handed arrest: 05/3/2010  Custody: 6 days;  Temporary detention: 30	The offender reached the age of majority when the proceeding initiated  LR: none	Date: 15/7/2011  Age: over 18 years old  S.: 24 months imprisonment with a	

Date: 20/3/2011			days; Guarantee: from 19/4/2011	DC: none	suspended sentence of 45 months and 28 days counted from 12/7/2011;	
	Offender: E Bd.: 02/6/1993 Age: 17 y. 9 m. 22 d.	Date: 24/3/2011 Age: 17y. 9 m. 20 d.	Red-handed arrest: 05/3/2010 Custody: 6 days; Temporary detention: 30 days; Guarantee: from 19/4/2011	LR: the offender's father; appeared in the state of investigation. DC: appointed lawyer in stage of investigation; attending point: no appearance.	Date: 15/7/2011 Age: over 18 years old S.: 24 months imprisonment with a suspended sentence of 45 months and 28 days counted from 12/7/2011.	
OF: Abusing Trust in order to Appropriate Property, Art.140 of PC Date: 19/10/2011	Offender: G Bd.: 13/01/1995 Age: 16 y. 9 m. 6 d.	Date: 24/11/2011 Age: 16 y. 10 m. 11 d.	Guarantee	LR: the offender's mother. Offender and LR relinquished the right to have an appointed defence counsel.	Date: 17/02/2012 Age: 17 y. 1 m. 4 d. S.: 12 months non-custodial reform counted from when verdict comes into force.	
OF: Extortion of Property, Art.135 of PC Date: 30/12/2010	Offender: H Bd.: 25/5/1994 Age: 16 y. 7 m. 5 d.	Date: 10/02/2011 Age: 16 y. 9 m. 15 d.	Ban from travel outside one's residence place	LR: the offender's mother, appeared in the trial. Offender and LR relinquished the right to have an appointed defence counsel.	Date: 24/5/2011 Age: 17 y. 5 m. 0 d. S.e: 12 months imprisonment with a suspended sentence of 24 months counted from 14/5/2011.	
OF: Stealing Property, Art.138 of PC Date: 31/3/2010	Offender: I Bd.: 21/11/1992 Age: 17 y. 4 m. 10 d.	Date: 27/4/2010. Age: 17 y. 5 m. 6 d.	Ban from travel outside the residence place	LR: the offender's mother; DC: lawyer selected by LR.	Date: 30/8/2010 Age: 17 y. 9 m. 9 d. S.: 9 months non-custodial reform	
OF: Stealing Property, Art.138	Offender: K Bd.: 16/10/1994	Date: 18/7/2011. Age: 16 y. 5 m. 2 d.	Guarantee	LR: offender's mother; Offender and LR	Date: 23/2/2012 Age: 17 y. 4 m. 17 d.	



of PC Date: 07/5/2011	Age: 16 y. 7 m. 21 d.			relinquished the right to have an appointed defence counsel	S.: 9 months imprisonment with a suspended sentence of 18 months counted from 23/2/2012.	
	Offender: L Bd.: 10/8/1993 Age: 17 y. 9 m. 27 d.	Date: 18/7/2011. Age: 17 y. 11 m. 8 d.	Guarantee	LR: the offender's father, appeared in the stage of investigation before L reached 18 years old.  Offender and LR relinquished the right to have an appointed defence counsel	Date: 23/2/2012 Age: majority S.: 9 months imprisonment with a suspended sentence of 18 months counted from 23/2/2012.	
	Offender: M Bd.: 26/08/1994 Age: 16 y. 9 m. 10 d.	Date: 18/7/2011. Age: 16 y. 11 m. 22 d.	Guarantee	LR: the offender's father.  Offender and LR relinquished the right to have an appointed defence counsel	Date: 23/2/2012 Age: 17 y. 5 m. 27 d. S.: 12 months non-custodial reform counted from when the judgment came into force.	
	Offender: N Bd.: 24/3/1994 Age: 17 y. 1 m. 13 d.	Date: 18/7/2011. Age: 17 y. 3 m. 24 d.	Guarantee	LR: the offender's mother.  Offender and LR relinquished the right to have an appointed defence counsel	Date: 23/2/2012 Age: 17 y. 11 m. 1 d. S.: 12 months non-custodial reform counted from when judgment comes into force.	
OF: Stealing Property, Art. 138 of PC Date:	Offender: O Bd.: 25/9 /1994	Date: 01/7/2011 Age: 16 y. 10 m. 6 d.	Ban from travel outside the residence place	LR: the offender's parents.  DC: lawyer selected by LR	Date: 29/9/2011 Age: majority	The offender and LR appeal for a suspended sentence  Appeal trial on 28/11/2011

30/6/2011	Age: 16 y. 10 m. 5 d.				S.e: 12 months imprisonment	Sentence: 12 months imprisonment with a suspended sentence of 24 months counted from 28/11/2011.
	Offender: P Bd.: 1986 Age: majority	Date: 01/7/2011 Age: majority	Temporary detention: over the course of the procedure	None	Date: 29/9/2011 Age: majority S.e: 30 months imprisonment	
	Offender: Q Bd.: 1989 Age: majority	Date: 01/7/2011 Age: majority	Temporary detention: over the course of the procedure	None	Date: 29/9/2011 Age: majority S.: 24 months imprisonment	
OF: Property Robbery by Snatching Art.136 of PC Date: 18/5/2010	Offender: R Bd.: 09/4/1993 Age: 17 y. 1 m. 9 d.	Date: 28/5/2010. Age: 17 y. 1 m. 19 d.	Urgent arrest: 19/5/2010 Custody: 9 days Temporary detention: 28/5/2010 Ban from travel outside the residence place: 23/6/2010	LR: the offender's father DC: appointed lawyer	Date: 31/11/2010 Age: 17 y. 7 m. 22 d. S.: 30 months imprisonment with a suspended sentence of 58 months counted from 31/11/2010.	
	Offender: S Bd.: 25/2/1992 Age: majority	Date: 28/5/2010. Age: majority	Urgent arrest: 19/5/2010 Custody: 9 days Temporary detention: 28/5/2010 Ban from travel outside the residence place: 23/6/2010	None	Date: 31/11/2010 Age: majority S.: 36 months imprisonment with a suspended sentence of 5 years counted from 31/11/2010.	
	Offender: T Bd.: 09/4/1993 Age: majority	Date: 28/5/2010. Age: majority	Urgent arrest: 19/5/2010 Custody: 9 days Temporary detention: 28/5/2010 Ban from travel outside the	None	Date: 31/11/2010 Age: majority S.: 24 months imprisonment with a suspended sentence of 46	

			residence place: 23/6/2010		months counted from 31/11/2010.	
OF: Intentionally Damaging Property, Art.143 of PC  Date: 19/9/2011	Offender: U  Bd.: 17/8/1995  Age: 15 y. 11 m. 29 d.	Date: 15/11/2011  Age: 16 y. 2 m. 28 d.	Ban from travel outside the residence place: 15/11/2011  Wanted warrant: 01/12/2011.  Arrest: 03/12/2011  Custody: 9 days  Guarantee: 12/12/2011	LR: the offender's mother  DC: people's advocate	Date: 16/01/2012  Age: 16 y. 4 m. 29 d.  S.: 9 months imprisonment	The offender appealed

**Case 1: U committed Intentionally Damaging Property** (prescribed at article 143/1 of the Penal Code 1999)<sup>134</sup>

***Procedural Information:***

- Offender U: birthdate 17/8/1995; Sex: male.
- The offence was committed on 19/09/2011 when the offender was 16 years old.
- Deterrent measure: To be held in custody for nine days, from 03/12/2011 to 12/12/2011.
- Initiation of criminal proceedings against the accused: 15/11/2011, when the offender was 16 years old.
- Trial: 16/01/2012, when the offender was 16 years old .
- Sentence: nine months imprisonment; including 9 days of being held in custody.
- Defence counsel: Q.H. a People's Advocate (not a lawyer); appointed by the procedure-conducting bodies.
- Lawful representative of the juvenile offender: N.T, the offender's mother.
- Appeal against the judgments of the court: by the offender: 19/01/2012.

<sup>134</sup> See Code 1999, *supra* note 33, art. 143/1 (explaining the crime of destroying or deliberately damaging property showing that "Those who destroy or deliberately damage another person's property, causing damage of between two million dong and under fifty million dong, or under two million dong but causing serious consequences, or who have already been administratively sanctioned for such act or sentenced for such offense and not yet entitled to criminal record remission but repeat their violations shall be subject to non-custodial reform for up to three years or to a prison term of between six months and three years." At present, 7 January 2013, twenty one thousand Vietnamese dong is approximately equivalent to US\$1, two million dong is equal to US\$ 95.3; fifty million dong is approximately US\$2,381).

**General comment on the procedure of case:** No serious violation of the criminal procedure during investigation, prosecution and trial.

**Case 2: C committed Stealing Property** (prescribed at article 138/1 of the Penal Code 1999)<sup>135</sup>

**Procedural Information:**

- Offender C: birth date 15/12/1993; Sex: female.
- The offence was committed on 03/04/2011; when the offender was 16 years old.
- Deterrent measures applied: Temporary detention; from 03/04/2011.
- Initiation of criminal proceedings against the accused: 05/04/2011; when the offender was 16 years old.
- Trial: 12/07/2011; when the offender was 16 years old;
- Lawful representative of the juvenile offender: D.V., vice president of the Vietnam Fatherland Front Committee of C.L. district.
- Sentence: six months imprisonment; the term of imprisonment counted from 03/04/2011.
- Defence counsel: Lawyer N.T. appointed by the procedure-conducting bodies.
- Appeal against judgments of the court: no information.

**General comment on the procedure of case:** No serious violation of the criminal procedure during investigation, prosecution and trial.

**Case 3: K and other accomplices committed Stealing Property** (prescribed at article 138/1 the Penal Code 1999)<sup>136</sup>

**Procedural Information:**

- Offenders:
  - **K:** birthdate 16/10/1994; Sex: male

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<sup>135</sup> *Id.* at art. 138/1 (describing the crime of Stealing Property that “Those who steal another person’s property valued between two million dong and fifty million dong, or under two million dong but causing serious consequences, or who have been administratively sanctioned for acts of appropriation or sentenced for the appropriation of property, not yet entitled to criminal record remission but who repeat their violations, shall be subject to non-custodial reform for up to three years or to a prison term of between six months and three years”).

<sup>136</sup> *Id.*

- **L:** birthdate 10/8/1993; Sex: male
- **M:** birthdate 26/08/1994; Sex: male
- **M:** birthdate 24/3/1994; Sex: male
- Offences committed: dated 07/05/2011 and 07/05/2011, when the offenders were 16–17 years old.
- Deterrent measure applied: Guarantee.
- Initiation of criminal proceedings against the accused: 23/02/2012; when the offenders were 16–17 years old.
- Trial: 12/07/2011; when the offenders were 17–18 years old.
- Lawful representative of the juvenile offenders: offenders' mothers or fathers.
- Sentences:
  - K and L: nine months imprisonment with a suspended sentence of 18 months counted from 03/04/2011;
  - M and N: 12 months of non-custodial reform from when the judgement comes into force.
- Defence counsel: the lawful representatives conducted the defence for the offenders.
- Appeal against judgments of the court: no information.

***General comment on the procedure of the case:*** No serious violation of the criminal procedure during investigation, prosecution and trial, which can be a reason for dismissing the judgment, is found.

At first glance, in terms of the procedure, excluding the content of judgements, it can be seen that all three cases were conducted as required by law. There was no serious violation of the law, which could have led to dismissal of the judgment for re-investigation or re-trial, as prescribed in articles 250 and 287 of the 2003,<sup>137</sup> and elucidated by Joint Circular 01/2010/TTLT-VKSNDTC-BCA-TANDTC on Guiding the Implementation of the Provisions of the Criminal Procedure Code on Returning the File for Additional Investigation.<sup>138</sup>

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<sup>137</sup> Code 2003, *supra* note 34.

<sup>138</sup> THONG TU LIEN TICH 01/2010/TTLT-VKSNDTC-BCA-TANDTC, *supra* note 123.

However, after carefully studying the three case files mentioned above I can make some comments about the implementation of legal normative documents on the right to defence of juvenile offenders.

The juvenile offenders hardly raised any self-defence. They only followed the questions of the procedure-conducting persons, encompassing investigators, procurators, and judges. Even in several minutes of interrogation of the accused it appears that juvenile offenders emphasized their faults rather than the nature of the problems. This can be explained by their ignorance of the law, as well as general social knowledge, and psychological fear during the interrogation of juvenile offenders. However, I also question whether there are any other factors which can affect juvenile offenders to explain why they had done wrong things such as being extorted during interrogation. This situation reveals that juvenile offenders in Vietnam seem to not freely express their views even when they are in severe circumstances, and may suffer having their freedom restricted or other punishments. Hence, when juvenile offenders cannot really express their view, the right to self-defence becomes worthless. This problem raises doubts about the process of investigation, interrogation, and the role of the defence counsel in those cases.

In comparison with the requirement of the CRC that “[a] child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”<sup>139</sup> and guidelines elucidated in the General Comment No. 10(2007) – Children’s Rights in Juvenile Justice,<sup>140</sup> and General Comment No. 12(2009) – the Right of the Child to be Heard,<sup>141</sup> it can be said that “one of the fundamental values of the Convention” has failed in the practice of Vietnam. Consequently, the relevant provisions of the 2003 Code concerning the right to self-defence of juvenile offenders have not been implemented successfully.

In Case 1 and Case 2, during the course of criminal proceedings, the role of the appointed defence counsels is really vague and somehow superficial. It appears that they signed in the minutes of interrogation of juvenile offender, showing their involvement in the process. But they seem completely passive, without asking any questions or making suggestions to clarify relevant issues, or to support juvenile offenders in terms of psychology

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<sup>139</sup> CRC, *supra* note 9, art. 12.

<sup>140</sup> Committee on the Rights of the Child, *supra* note 16, paragraphs 43-45.

<sup>141</sup> Committee on the Rights of the Child, *supra* note 17, paragraph 2.

– even when the offenders gave strange or illogical answers. For example, in Case 1 when the interrogation began, the investigator asked U, “why when the investigating body summoned you did you not appear?” U answered, “I had known the investigating body summoned me many times, as my mother let me know about that, but I did not go. I do not like to talk with the police”.<sup>142</sup>

A question posed from Case 1 is whether it is “normal” that the events happened as follows. The decision of the State Legal Aid Centre of BD province appointed Q.H. to defend juvenile offender U on 7/12/2011 and the certificate of defence was issued by the investigating body also on 7/12/2011, but the defence counsel Q.H. participated in the interrogation of the accused at 7:30 a.m. of the same day as his signature on the minutes recorded. In other words, the defence counsel Q.H. seemed to have attended the interrogation before the investigating body issued a request, and before he was appointed by the State Legal Aid Centre. This situation should be surprising because it could not happen in practice. However, it is not difficult to find similar cases while studying court case files.

In Case 3, the four offenders were juveniles during the investigation and prosecution, but in the trial stage, one of the four reached the age of maturity. Also, it is surprising that all the offenders and their lawful representatives had signed papers to relinquish the right to have an appointed defence counsel as prescribed by law. The parents of all four juvenile offenders stated they would conduct the defence for their children. It should be stressed that, as extracted from the offenders’ profiles, all of them are farmers, living in rural areas, and have neither legal education, nor experience and skills in defence. Except for love for their children, those lawful representatives did not have anything which could be interpreted as a indicator that the defence of juvenile offenders would be conducted effectively. When studying the full court case files, I could not find any noticeable argument given by the lawful representatives so as to defend the juvenile offenders during the course of investigation as well as the court session. The lawful representatives of the offenders just answered a few simple questions that the judge, prosecutor, or jurors asked them as required by the court procedure.

In short, while reading the case files, all of them made me speculate about the actual effectiveness of implementation of the right to defence of juvenile offenders. The defence

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<sup>142</sup> Files of the Binh Dinh Province court; name note provided in order to protect anonymity of juvenile offenders.

counsels did not attempt to carry out their job as required by law, while procedure-conducting bodies tended to abuse the law on the right to defence of juvenile offenders.

#### **IV. CONCLUSION**

From the analysis presented above, it can be concluded that the right to defence of offenders in general, especially the right to defence of juvenile offenders was attended to from very early in the development of Vietnam's modern society. The right to defence has been set out in increasing detail with specific regulations. Since 1990, Vietnam has demonstrated considerable progress in acknowledging the right to defence of juvenile offenders in its law. The juvenile offenders are entitled to defend themselves, or be defended by their lawful representatives or defence counsel in all stages of criminal proceedings.

With respect to the corresponding provisions of the Convention on the Rights of the Child on this issue, it cannot be said that Vietnam is still unfamiliar with the requirements of the Convention. Looking at relevant articles of the 2003 Code and other legal normative documents concerning defence in criminal proceedings, it can be confirmed that Vietnam's regulations are very close to the requirements of the CRC about the right to legal assistance of the child who is alleged as, or accused of, having infringed the penal law.

However, there are significant problems in the realization of this right. At present, Vietnam does not have adequate statistical information on the right to defence of juvenile offenders. The implementation of the law on defending juvenile offenders seems to be inefficient and formalistic. Juvenile offenders and their legal representatives do not appear to understand the meaning of the right to have an appointed defence counsel. Meanwhile, the procedure-conducting bodies seem to abuse the right, and are less enthusiastic in implementing the provisions of the law to ensure the right to defence is actually applied in particular criminal cases. All of this requires Vietnam to enhance the dissemination of relevant information on the law in order to raise public awareness on this issue. The situation also indicates that Vietnam needs more effective mechanisms in the implementation of the law, pushing the related persons and agencies conducting criminal proceedings to ensure the right to defence for juvenile offenders. When such activities are carried out, the gap between the regulations on paper and the practice of law enforcement will be lessened and closed.